



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FEB 23 2016

Frank Dixon
State Chair, Democratic Party of Oregon
232 NE 9th Avenue
Portland, OR 97232

RE: MUR 6817
Dr. Monica Wehby for U.S. Senate, *et al.*

Dear Mr. Dixon:

This is in reference to the complaint you filed with the Federal Election Commission on May 16, 2014 concerning Dr. Monica Wehby for U.S. Senate and Bryan Burch in his official capacity as treasurer, Dr. Monica Wehby, If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her official capacity as treasurer, and Andrew Miller. The Commission found that there was reason to believe that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her official capacity as treasurer violated 52 U.S.C. § 30104(g), a provision of the Federal Election Campaign Act of 1971, as amended (the "Act"), with respect to the radio advertisement. On February 18, 2016, a conciliation agreement signed by the Carol Russell in her official capacity as treasurer was accepted by the Commission. A copy of the agreement is enclosed for your information.

The Commission voted to dismiss the allegations that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a), 30104(b), and 30120(a), and voted to find no reason to believe that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her official capacity as treasurer violated 52 U.S.C. § 30104(g) with respect to the billboard. The Commission also voted to dismiss the allegations that Dr. Monica Wehby for U.S. Senate and Bryan Burch in his official capacity as treasurer and Dr. Monica Wehby violated 52 U.S.C. § 30116(f). Finally, the Commission voted to dismiss the allegations that Andrew Miller violated 52 U.S.C. § 30116(a). The Factual and Legal Analyses, which more fully explain the basis for the Commission's decision, are enclosed.

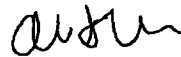
The Commission has now closed the file in this matter. Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003);

Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74
Fed. Reg. 66,132 (Dec. 14, 2009).

The Act allows a complainant to seek judicial review of the Commission's dismissal of
this action. *See* 52 U.S.C. § 30109(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,



Allison T. Steinle
Attorney

Enclosures
Conciliation Agreement
Factual and Legal Analyses

BEFORE THE FEDERAL ELECTION COMMISSION

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In the matter of)
) MUR 6817
If He Votes Like That In Salem)
Imagine What He Will Do In Congress)
and Carol Russell in her Official Capacity)
as Treasurer)

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized Complaint by Frank Dixon. The Commission found reason to believe that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer ("Respondents" or "Committee") violated 52 U.S.C. § 30104(g) (formerly 2 U.S.C. § 434(g)) of the Federal Election Campaign Act of 1971, as amended, (the "Act").

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 52 U.S.C. § 30109(a)(4)(A)(i) (formerly 2 U.S.C. § 437g(a)(4)(A)(i)).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

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COUNSEL

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IV. The pertinent facts and law in this matter are as follows:

1. The Committee is an independent expenditure-only committee that is not affiliated with any candidate or elected official. Carol Russell is the Committee's treasurer of record.

2. A political committee that makes independent expenditures "aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours." 52 U.S.C. § 30104(g)(2)(A) (formerly 2 U.S.C. § 434(g)(2)(A)). The political committee must ensure that the Commission receives such reports by the end of the second day "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2).

3. Respondents reported making \$51,637 in total independent expenditures for "radio ads" opposing Jason Conger in the 2014 Senate primary in Oregon on April 1, 2014, on the Committee's 2014 12-Day Pre-Primary Report. The Committee did not file a 48-Hour Independent Expenditure Report for these expenditures.

4. On August 25, 2014, the Commission sent a Request for Additional Information ("RFAI") to the Committee referencing its 2014 12-Day Pre-Primary Report and the Committee's failure to file the required 48-Hour Report for the independent expenditures. On September 29, 2014, the Committee filed a 24-Hour Report for the April 1, 2014, independent expenditures referenced in the RFAI.

V. Respondents violated 52 U.S.C. § 30104(g)(2)(A) (formerly 2 U.S.C. § 434(g)(2)(A)) when the Committee failed to file the required 48-Hour Independent

Expenditure Report for the \$51,637 in independent expenditures reported on the Committee's
2014 12-Day Pre-Primary Report.

VI. 1. Respondents will pay a civil penalty to the Commission in the amount of Four
Thousand One Hundred and Twenty Five Dollars (\$4,125), pursuant to 52 U.S.C.
§ 30109(a)(5)(A) (formerly 2 U.S.C. § 437g(a)(5)(A)).

2. Respondents will cease and desist from committing violations of 52 U.S.C.
§ 30104(g)(2)(A) (formerly 2 U.S.C. § 434(g)(2)(A)).

VII. The Commission, on request of anyone filing a complaint under 52 U.S.C.
§ 30109(a)(1) (formerly 2 U.S.C. § 437g(a)(1)) concerning the matters at issue herein or on its
own motion, may review compliance with this agreement. If the Commission believes that this
agreement or any requirement thereof has been violated, it may institute a civil action for relief
in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have
executed the same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than 30 days from the date this agreement
becomes effective to comply with and implement the requirements contained in this agreement
and to so notify the Commission.

MUR 6817 (If He Votes Like That In Salem Imagine What He Will Do In Congress, *et al.*)
Conciliation Agreement

X. This conciliation agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained within this written agreement shall be enforceable.

FOR THE COMMISSION:

BY: Kath Guith
Kathleen Guith
Acting Associate General Counsel
for Enforcement

2-19-16
Date

FOR THE RESPONDENTS:

Carol Russell
Carol Russell
Treasurer

2-2-2016
Date

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR: 6817

RESPONDENTS: If He Votes Like That In Salem Imagine What He Will Do In Congress
and Carol Russell in her Official Capacity as Treasurer

I. INTRODUCTION

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended, (the "Act") by Dr. Monica Wehby for U.S. Senate and Bryan Burch in his Official Capacity as Treasurer ("Wehby Committee"), Dr. Monica Wehby, If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer ("If He Votes"), and Andrew Miller. The Complaint alleges that If He Votes made a prohibited contribution to Wehby by coordinating a billboard and radio advertisement with the Wehby campaign. The Complaint further alleges that If He Votes failed to report polling expenses connected to these advertisements, include the proper disclaimers, and file 48-Hour Independent Expenditure Reports for the two communications in question.

As explained below, the Commission exercises its prosecutorial discretion to dismiss the allegations that If He Votes made in-kind contributions as a result of the advertisements in violation of 52 U.S.C. § 30116(a). *See Heckler v. Chaney*, 470 U.S. 821 (1985). Further, because of the vagueness of the evidence suggesting that If He Votes incurred polling expenses or accepted any polling results that it should have reported to the Commission, and in light of a sworn denial from an individual who appears to have had personal involvement in the activities at issue, the Commission dismisses the allegation that If He Votes violated 52 U.S.C. § 30104(b). It does appear that If He Votes failed to include a complete and accurate disclaimer on the radio advertisement. However, based on the circumstances, the Commission dismisses the allegation

1 that If He Votes violated 52 U.S.C. § 30120(a). Finally, it appears that If He Votes failed to file
2 a 48-Hour Independent Expenditure Report for the radio advertisement. Accordingly, the
3 Commission finds reason to believe that If He Votes violated 52 U.S.C. § 30104(g).

4 **II. FACTS**

5 **A. Background**

6 Dr. Monica Wehby was a candidate in the 2014 Republican Senate primary in Oregon.¹
7 She filed her Statement of Candidacy with the Commission on October 24, 2013. The Wehby
8 Committee is Wehby's authorized campaign committee. Representative Jason Conger was
9 Wehby's opponent in the primary race.

10 If He Votes is an independent expenditure-only political committee registered with the
11 Commission. It filed its Statement of Organization on March 5, 2014, and has regularly filed
12 disclosure reports and independent expenditure notices with the Commission. According to If
13 He Votes, Rodney Stubbs was the founder and original treasurer of If He Votes, which he
14 formed to oppose Conger "because of his bad voting record" as an Oregon State legislator. If He
15 Votes Resp. at 5; Gregg Clapper Decl. at 1-2 (May 23, 2014); Rodney Stubbs Decl. at 1-2 (May
16 23, 2014).

17 To date, If He Votes has been funded primarily by two individuals, Loren Parks and
18 Andrew Miller. Of the \$114,033 that If He Votes has received in total receipts since its
19 formation, Parks and Miller have contributed \$83,033 and \$30,950, respectively. Of the \$30,950
20 that Miller contributed to If He Votes, \$5,950 consisted of in-kind "billboard" expenses. *See If*
21 *He Votes 2014 April Quarterly Report* (filed Apr. 14, 2014).

¹ Wehby won the Republican primary on May 20, 2014, making her the Republican nominee for the general election. Wehby lost the general election on November 4, 2014.

1 According to the Respondents, Parks and Miller "were simply funders" and "were not
2 informed about the activities of If He Votes." If He Votes Resp. at 3-5; Clapper Decl. at 2.
3 Further, the Respondents specifically assert that Miller is not an agent or representative of If He
4 Votes. If He Votes Resp. at 3, 5; Clapper Decl. at 2.

5 Miller also contributed \$5,200 to the Wehby Committee on November 1, 2013, and was
6 one of 25 hosts listed on an invitation for a Wehby Committee fundraiser at a private residence
7 on April 30, 2014. See Wehby Committee 2013 Year-End Report (filed Jan. 26, 2014); Compl.,
8 Ex. C.

9 **B. If He Votes' Communications**

10 Since its formation, If He Votes has sponsored at least two communications criticizing
11 Conger.² The first advertisement was a billboard, for which Miller appears to have made the
12 in-kind contribution to If He Votes in the amount of \$5,950.³ If He Votes states that the
13 billboard was displayed for two weeks beginning on March 19, 2014. See If He Votes Resp. at
14 6. The billboard, as represented in a photograph attached to the Complaint, read:

15 *Republican (?) Jason Conger voted 5 times with Democrats for Oregon's*
16 *OBAMACARE! Imagine how he'll vote as a U.S. Senator.*

17
18 *Paid for by If He Votes Like That In Salem Imagine What He Will Do In*
19 *Congress (www.ifhevoteslikethatsalem.com) and not authorized by any*
20 *candidate or candidate's committee.*

21 Compl., Ex. A (emphases in original).

² According to If He Votes' Response, which was dated May 23, 2014, If He Votes "had only those two communications." If He Votes Resp. at 6. If He Votes' disclosure reports, however, indicate that it also made an independent expenditure of \$6,860 for a "mailer" opposing Conger on May 15, 2014. See If He Votes 2014 July Quarterly Report (filed July 15, 2014). This mailer is not raised in the Complaint, and we do not address it in this Report.

³ If He Votes reported the receipt and corresponding disbursement of a \$5,950 "In-Kind: Billboard" contribution from Miller on March 19, 2014, on its 2014 April Quarterly Report. If He Votes did not report any additional receipts or expenditures that appear related to billboard time or production.

1 The second advertisement was a radio advertisement that aired from April 11, 2014, to
2 May 16, 2014. See *If He Votes Resp.* at 6. The radio advertisement, as represented in an audio
3 clip and transcript attached to the Complaint, ran 57 seconds, and stated:

4 Republican Jason Conger voted with Democrats for Oregon's Obamacare. Not
5 once or twice, or three or four times – Republican Jason Conger voted five times
6 with Democrats for Oregon's Obamacare. Republican Jason Conger also voted
7 with Democrats for the boondoggle I-5 light rail bridge. You know, the one that
8 promised astronomical costs coupled with high tolls for working people, but no
9 traffic relief. And Republican Jason Conger voted with Democrats to put the
10 government into the hotel business, competing with private enterprise. Jason,
11 Republicans don't like it when you vote that way. So now we're gonna vote 'no'
12 on Jason Conger!

13
14 Paid for by If He Votes Like That In Salem Imagine How He Will Vote In
15 Congress. Not authorized by any candidate or candidate's committee.

16 Compl. at 2 n.2 (citing Jeff Mapes, *Timber Baron Andrew Miller Says He Didn't Tell Monica*
17 *Wehby About His Ads Attacking Jason Conger*, THE OREGONIAN, Apr. 16, 2014,
18 http://www.oregonlive.com/mapes/index.ssf/2014/04/timber_baron_andrew_miller_say.html
19 (“Mapes, *Timber Baron*”) (providing an audio clip of the radio advertisement)), Ex. B.

20 Throughout the course of the primary campaign, several news articles discussing the
21 activities of If He Votes mentioned that Miller had formerly been “romantically linked to”
22 Wehby and involved in her campaign fundraising. Compl. at 2-4.⁴ Miller publicly denied
23 coordinating with the Wehby campaign and was quoted as stating that “the advertising campaign
24 [by If He Votes] was run independently of Wehby and her campaign as required by federal

⁴ The Complaint specifically cites to Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to Candidates for Governor, Senate and Congress*, THE OREGONIAN, Oct. 30, 2013, http://www.oregonlive.com/politics/index.ssf/2013/10/top_oregon_gop_donor_andrew_miller.html, and Jeff Mapes, *Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger*, THE OREGONIAN, Apr. 15, 2014, http://www.oregonlive.com/mapes/index.ssf/2014/04/andrew_miller_friend_of_monica.html. According to a news report referenced in *If He Votes' Response*, Miller and Wehby ended their dating relationship in the spring of 2013. *If He Votes Resp.* at 4, Ex. 1 (attaching John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>).

election law.” *Id.* at 2 n.2 (citing Mapes, *Timber Baron*). According to a news article in *The*

Oregonian:

Miller acknowledged that there is a “sidebar risk” that his advertising effort could be seen negatively because of his relationship to Wehby. But, he added, “I don’t think it’s relevant outside of a group of people who pay a lot of attention to politics.” [Miller] said polling showed this risk was far outweighed by the effectiveness of the attacks he and Parks are making on Conger’s voting record in the state House.

Id.

The Respondents state that Gregg Clapper, a political consultant, was hired to develop the two If He Votes communications and did not consult with anyone other than Stubbs. If He Votes Resp. at 3; Clapper Decl. at 2. Clapper attests that he “personally did nearly 100% of the concept, message development, strategy and other aspects of these communications,” and that “[o]nly some graphic design staff, and web design staff, and the voice actor worked on parts of the communications before they were public.” Clapper Decl. at 2. Clapper attests that he did not have any relationship with Wehby or her campaign. *Id.* at 3. He also attests that Miller “did not and was not allowed to have any input into the messaging, content, or even the advertisement strategy” for the advertisements, including the billboard. *Id.* at 2; *see also* If He Votes Resp. at 3. With regard to the in-kind contribution from Miller in connection with the billboard, Clapper avers that If He Votes merely “took advantage of that [donation of some billboard time] for about a two week period.” *See* Clapper Decl. at 2. Stubbs attests that he met Miller and a few people from the Wehby campaign “over the course of their campaign, but . . . [Stubbs] was not in charge of [If He Votes’] messaging, and nobody from the outside ever made any suggestions or request . . . for any kind of content or messaging.” Stubbs Decl. at 2. Stubbs’ declaration further states that he handled the “checkbook and expenditures of funds” and Clapper “was completely in charge of the messaging.” *Id.* Although the Complaint suggests that If He Votes may have

1 conducted some form of polling, If He Votes denies that it conducted or used any polling. If He
2 Votes Resp. at 7; Clapper Decl. at 2; Stubbs Decl. at 2. Clapper states in a sworn declaration that
3 If He Votes "did not use any polling information, . . . did not . . . conduct any polling[, and] did
4 not use anyone else's polling." Clapper Decl. at 2. Stubbs also states that "[w]e did not use any
5 polling information, we did not even conduct any polling, we did not pay for polling." Stubbs
6 Decl. at 2.

7 **III. LEGAL ANALYSIS**

8 **A. The Commission dismisses the allegation that the billboard or radio**
9 **advertisements were coordinated communications.**

10 The Complaint alleges that If He Votes made a prohibited contribution to Wehby by
11 coordinating the billboard and radio advertisement with the Wehby campaign. Compl. at 3-4;
12 Supp. Compl. at 3-4. Under the Act, when a person or committee pays for a communication that
13 is coordinated with a candidate or his or her authorized committee, the communication is
14 considered an in-kind contribution from the person or committee to that candidate and is subject
15 to the limits, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30116(a)(7)(B)(i);
16 11 C.F.R. § 109.21(b). Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is
17 paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more
18 of four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of six
19 conduct standards set forth at 11 C.F.R. § 109.21(d).

20 In this matter, the payment and content prongs are satisfied, which If He Votes does not
21 dispute. *See* If He Votes Resp. at 6-8, Ex. 5. If He Votes reported making a \$5,950
22 disbursement for billboard expenses on March 19, 2014, and \$59,557 in total independent
23 expenditures for "radio ads" between April 1, 2014, and April 3, 2014. *See* 11 C.F.R.
24 § 109.21(a)(1). Moreover, based on information before the Commission, it appears that the

1 billboard and radio advertisement meet the content prong because each is a public
2 communication that clearly identified Conger, was disseminated within 90 days of the May 20,
3 2014 primary election, and was targeted to voters in Oregon. *See* 11 C.F.R. § 109.21(c)(4).

4 The main issue, therefore, is whether the communications satisfied the conduct prong.
5 The conduct standard is satisfied when, among other things, the communication is made at the
6 request or suggestion of a candidate, a candidate or authorized committee is materially involved
7 in decisions regarding the communication, or a communication is made after substantial
8 discussion about that communication with a candidate.⁵ *See* 11 C.F.R. §§ 109.21(d)(1)-(3).

9 Neither the material involvement nor substantial discussion standard is “satisfied if the
10 information material to the creation, production, or distribution of the communication was
11 obtained from a publicly available source.” 11 C.F.R. §§ 109.21(d)(2), (3).

12 The Complaint asserts that Miller was “intimately involved” with Wehby both personally
13 and as a fundraiser, and therefore likely “exposed to nonpublic information about the campaign’s
14 nonpublic plans, projects, activities, or needs.” Compl. at 4. The Complaint cites news articles
15 to support the theory that Miller’s relationship with Wehby allowed him access to inside

⁵ The other three types of conduct that may satisfy the conduct standard are using a common vendor, using a former employee, and republication of campaign materials. *See* 11 C.F.R. § 109.21(d)(4)-(6). Because the Complaint does not allege this conduct, and because the Respondents assert that Clapper did not do any work for Wehby or her campaign, *see* If He Votes Resp. at 6; Clapper Decl. at 3, the Commission’s analysis does not address these three types of conduct.

1 campaign information.⁶ Another article provided to the Commission, however, states that the
2 relationship ended the previous year, in the spring of 2013.⁷

3 The Complaint also asserts that "Miller was intimately involved in the strategic decision-
4 making of If He Votes" because he had spoken on the public record about If He Votes' polling
5 decisions as a representative of the group. *Id.* at 3; Supp. Compl. at 2. Yet sworn affidavits from
6 If He Votes' founder, Rodney Stubbs, and political consultant, Gregg Clapper, state that Miller
7 had no involvement in any such polling effort. *See* Stubbs Decl.; Clapper Decl. Moreover,
8 Clapper states in his affidavit that If He Votes did not conduct any polling. Clapper Decl. at 2.

9 The Complaint further asserts that by contributing funds and the use of billboard
10 advertising space, Miller was involved "in decisions regarding the time, place, and manner" of
11 the advertisement, Compl. at 3, but If He Votes asserts — including in a sworn declaration —
12 that Miller had "no input into the two communications." If He Votes Resp. at 3; Clapper Decl. at
13 2. In this case, Miller's contribution of funds and the use of "some billboard time" to If He
14 Votes does not alone establish the conduct prong of 11 C.F.R. § 109.21. The record provides no
15 indication that Miller actually had access to non-public campaign information, and does not
16 establish that he requested or made decisions on behalf of Wehby as to how the funds or
17 billboard time were to be used. *See* 11 C.F.R. § 109.21(d).

⁶ See Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to Candidates for Governor, Senate and Congress*, THE OREGONIAN, Oct. 30, 2013, <http://www.oregonlive.com/politics/index.ssf/2013/10/top-oregon-gop-donor-andrew-miller.html>, and Jeff Mapes, *Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger*, THE OREGONIAN, Apr. 15, 2014, <http://www.oregonlive.com/mapes/index.ssf/2014/04/andrew-miller-friend-of-monica.html>.

⁷ See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>.

1 Under the circumstances, the Commission concludes that pursuing this matter further
2 would not be a prudent use of its resources. Accordingly, the Commission exercises its
3 prosecutorial discretion to dismiss the allegations that If He Votes Like That In Salem Imagine
4 What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer made
5 in-kind contributions as a result of the advertisements in violation of 52 U.S.C. § 30116(a). *See*
6 *Heckler*, 470 U.S. 821.

7 **B. The Commission dismisses the allegation that If He Votes failed to report**
8 **polling expenses.**

9 The Complaint also alleges that If He Votes failed to report polling expenses connected
10 to the two advertisements. Supp. Compl. at 4. As noted above, Miller reportedly stated that
11 "polling showed" that any "optics" of coordination in light of his relationship with Wehby were
12 "far outweighed by the effectiveness of the attacks." Compl. at 2 n.2 (citing Mapes, *Timber*
13 *Baron*); Supp. Compl. at 2 n.1 (same). The Complaint asserts that this statement indicates that If
14 He Votes accepted and used third-party polling to determine whether its advertising would be
15 effective, but failed to report any disbursements or in-kind receipts for polling to the
16 Commission. Supp. Compl. at 4.

17 The Act requires committee treasurers to file reports of receipts and disbursements in
18 accordance with the provisions of 52 U.S.C. § 30104 (formerly 2 U.S.C. § 434). 52 U.S.C.
19 § 30104(a)(1) (formerly 2 U.S.C. § 434(a)(1)); 11 C.F.R. § 104.1(a). These reports must include
20 the total amount of receipts and disbursements. 52 U.S.C. § 30104(b) (formerly 2 U.S.C.
21 § 434(b)); 11 C.F.R. § 104.3. The Act also requires committees to disclose itemized breakdowns
22 of receipts and disbursements; and disclose the name and address of each person who has made
23 any contribution or received any disbursement in an aggregate amount or value in excess of \$200

1 within the calendar year, together with the date and amount of any such contribution or
2 disbursement. 52 U.S.C. § 30104(b)(2)-(6); 11 C.F.R. § 104.3(a)(3)-(4), (b)(2)-(4).

3 Commission regulations treat a committee's acceptance of opinion poll results as an
4 in-kind contribution from the purchaser to the committee. 11 C.F.R. § 106.4(b). Acceptance
5 occurs when a committee requests the results, uses the results, or does not notify the contributor
6 that the results are refused. *Id.* A committee's acceptance of any opinion poll results that have
7 been made public prior to receipt without request, prearrangement, or coordination by the
8 recipient committee does not result in an in-kind contribution. *Id.* § 106.4(c).

9 If He Votes' Response generally denies that it used any polling. If He Votes Resp. at 7;
10 Clapper Decl. at 2; Stubbs Decl. at 2. Further, Clapper states in a sworn declaration that If He
11 Votes "did not use any polling information, . . . did not . . . conduct any polling[, and] did not use
12 anyone else's polling." Clapper Decl. at 2. Stubbs also states that "[w]e did not use any polling
13 information, we did not even conduct any polling, we did not pay for polling." Stubbs Decl. at 2.
14 Although the Complaint suggests that If He Votes may have conducted some form of polling, in
15 light of Clapper's explicit and sworn denial, which is purportedly based on personal involvement
16 in the activities at issue, the Commission dismisses the allegation that If He Votes Like That In
17 Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as
18 Treasurer violated 52 U.S.C. § 30104(b). *See Heckler*, 470 U.S. 821.⁸

19 **C. The Commission dismisses the allegation that If He Votes failed to include**
20 **the proper disclaimer on the radio advertisement.**

21 The Complaint further alleges that the radio advertisement did not include the proper
22 disclaimer. Compl. at 3. The available information indicates that the radio advertisement stated

⁸ See also Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (stating that dismissal is appropriate where the matter does not merit further use of Commission resources due to the vagueness of the evidence).

1 that it was "Paid for by If He Votes Like That In Salem Imagine What He Will Do In Congress"
2 and "not authorized by any candidate or candidate's committee." Compl. at 2 n.2 (citing Mapes,
3 *Timber Baron*), Ex. B.

4 If a communication by a political committee is authorized by a candidate, an authorized
5 political committee, or its agents, then it must state that it has been paid for by such authorized
6 political committee. 52 U.S.C. § 30120(a)(1); 11 C.F.R. § 110.11(a)(1), (b)(2). If a
7 communication is not authorized by a candidate, an authorized political committee of a
8 candidate, or its agents, then it must state the name and permanent street address, telephone
9 number or World Wide Web address of the person who paid for the communication and state
10 that it is not authorized by any candidate or candidate's committee. 52 U.S.C. § 30120(a)(3); 11
11 C.F.R. § 110.11(b)(3).

12 The available transcript and audio clip of the radio advertisement do not include an
13 address, phone number, or World Wide Web address for the committee. In addition, the radio
14 advertisement misstates the committee's full name as "If He Votes Like That In Salem Imagine
15 *How He Will Vote* In Congress" (emphasis added). If He Votes' Response acknowledges that
16 the omission of an address or phone number occurred, and states that the advertisement ran
17 "about 12 times" without the full disclaimer from April 9, 2014, to April 11, 2014. If He Votes
18 Resp. at 6. If He Votes further states that once this omission was discovered, a corrected,
19 "nearly identical" advertisement was placed back on the air, which ran until May 16, 2014, *Id.*

20 Although If He Votes failed to include a complete disclaimer on the radio advertisement,
21 the Commission dismisses the allegations that If He Votes Like That In Salem Imagine What He
22 Will Do In Congress and Carol Russell in her Official Capacity as Treasurer violated 52 U.S.C.
23 § 30120(a) based on the circumstances of the violation. *See Heckler*, 470 U.S. 821.

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1 Specifically, it appears that If He Votes made efforts to correct the omission upon discovery and
2 that the advertisement aired only 12 times with the incomplete disclaimer. In addition, to the
3 extent that the advertisement lacked the full disclaimer and provided the incorrect name for the
4 committee, given the committee's distinctive naming, it is unlikely that the public was either
5 intentionally or unintentionally misled as to who approved the message.

6 **D. The Commission finds reason to believe that If He Votes failed to file a**
7 **48-Hour Independent Expenditure Report for the radio advertisement.**

8 Finally, the Complaint alleges that If He Votes Failed to file 48-Hour Independent
9 Expenditure Reports for the billboard and the radio advertisement. Compl. at 5. If He Votes
10 reported making a \$5,950 disbursement for billboard expenses on March 19, 2014, on its 2014
11 April 2014 Quarterly Report, and \$59,557 in total independent expenditures for "radio ads"
12 between April 1, 2014, and April 3, 2014, on its 2014 12-Day Pre-Primary Report. If He Votes
13 does not appear to have filed any 48-Hour Independent Expenditure Reports for these
14 expenditures.

15 The Act defines "independent expenditure" as an expenditure by a person expressly
16 advocating the election or defeat of a clearly identified federal candidate that is not made in
17 concert or cooperation with or at the request or suggestion of such candidate, the candidate's
18 authorized political committee, or their agents, or a political party committee or its agents.
19 52 U.S.C. § 30101(17). A political committee that makes independent expenditures
20 "aggregating \$10,000 or more at any time up to and including the 20th day before the date of an
21 election shall file a report describing the expenditures within 48 hours." 52 U.S.C. §
22 30104(g)(2)(A). The political committee must ensure that the Commission receives such reports
23 by the end of the second day "following the date on which a communication that constitutes an

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1 independent expenditure is publicly distributed or otherwise publicly disseminated.” 11 C.F.R.
2 § 104.4(b)(2).

3 With respect to the billboard, we conclude that it was not an independent expenditure
4 because it did not expressly advocate against Conger. *See* 11 C.F.R. § 100.22. Specifically,
5 although the billboard implies that Conger votes with Democrats and will do the same in the
6 Senate, that message could be negative or positive depending on the viewer, and there is no
7 explicit call to action with respect to defeating Conger in the Senate race. Accordingly, we
8 recommend that the Commission find no reason to believe that If He Votes failed to file a 48-
9 Hour Report for the billboard.

10 With respect to the radio advertisement, however, If He Votes reported making \$51,637
11 in independent expenditures for “radio ads” on April 1, 2014,⁹ on its 2014 Pre-Primary Report,
12 and does not dispute that the radio advertisement was an independent expenditure for which it
13 did not file a 48-Hour Report.¹⁰ Accordingly, the Commission finds reason to believe that If He
14 Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her
15 Official Capacity as Treasurer violated 52 U.S.C. § 30104(g).

⁹ As discussed above, If He Votes represents in its response that this radio advertisement was one of only two communications it disseminated, although according to its disclosure reports, the group also disseminated a mailer on May 15, 2014. *See infra* n. 2. The Commission therefore infers that the \$51,637 If He Votes reported as an independent expenditure for “radio ads” was attributable to the communication in question here.

¹⁰ On August 25, 2014, the Commission sent a Request for Additional Information (“RFAI”) to If He Votes referencing its 2014 12-Day Pre-Primary Report and the committee’s failure to file the required 48-Hour Report for the April 1, 2014, independent expenditures, which totaled \$51,637. On September 29, 2014, If He Votes did file a 24-Hour Report for the April 1, 2014, independent expenditures referenced in the RFAI.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR: 6817

RESPONDENTS: Dr. Monica Wehby for U.S. Senate and Bryan Burch in his Official
Capacity as Treasurer
Dr. Monica Wehby

I. INTRODUCTION

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended, (the "Act") by Dr. Monica Wehby for U.S. Senate and Bryan Burch in his Official Capacity as Treasurer ("Wehby Committee"), Dr. Monica Wehby, If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer ("If He Votes"), and Andrew Miller. The Complaint alleges that If He Votes made a prohibited contribution to Wehby by coordinating a billboard and radio advertisement with the Wehby campaign.

As explained below, the Commission exercises its prosecutorial discretion to dismiss the allegations that Dr. Monica Wehby for U.S. Senate and Bryan Burch in his Official Capacity as Treasurer or Dr. Monica Wehby accepted in-kind contributions as a result of the advertisements in violation of 52 U.S.C. § 30116(f). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTS

A. Background

Dr. Monica Wehby was a candidate in the 2014 Republican Senate primary in Oregon.¹ She filed her Statement of Candidacy with the Commission on October 24, 2013. The Wehby

¹ Wehby won the Republican primary on May 20, 2014, making her the Republican nominee for the general election. Wehby lost the general election on November 4, 2014.

1 Committee is Wehby's authorized campaign committee. Representative Jason Conger was
2 Wehby's opponent in the primary race.

3 If He Votes is an independent expenditure-only political committee registered with the
4 Commission. It filed its Statement of Organization on March 5, 2014, and has regularly filed
5 disclosure reports and independent expenditure notices with the Commission.

6 To date, If He Votes has been funded primarily by two individuals, Loren Parks and
7 Andrew Miller. Parks and Miller have contributed \$83,033 and \$30,950, respectively, of the
8 \$114,033 that If He Votes has received in total receipts since its formation. Of the \$30,950 that
9 Miller contributed to If He Votes, \$5,950 consisted of in-kind "billboard" expenses. *See* If He
10 Votes 2014 April Quarterly Report (filed Apr. 14, 2014).

11 Miller also contributed \$5,200 to the Wehby Committee on November 1, 2013, and was
12 one of 25 hosts listed on an invitation for a Wehby Committee fundraiser at a private residence
13 on April 30, 2014. *See* Wehby Committee 2013 Year-End Report (filed Jan. 26, 2014); Compl.,
14 Ex. C.

15 **B. If He Votes' Communications**

16 Since its formation, If He Votes has sponsored at least two communications criticizing
17 Conger.² The first advertisement was a billboard, for which Miller appears to have made the
18 in-kind contribution in the amount of \$5,950.³ The billboard, as represented in a photograph
19 attached to the Complaint, read:

² If He Votes' disclosure reports indicate that it also made an independent expenditure of \$6,860 for a "mailer" opposing Conger on May 15, 2014. *See* If He Votes 2014 July Quarterly Report (filed July 15, 2014). This mailer is not raised in the Complaint, and we do not address it in this Report.

³ If He Votes reported the receipt and corresponding disbursement of a \$5,950 "In-Kind: Billboard" contribution from Miller on March 19, 2014, on its 2014 April Quarterly Report. If He Votes did not report any additional receipts or expenditures that appear related to billboard time or production.

1 Republican (?) Jason Conger voted 5 times with *Democrats* for Oregon's
2 OBAMACARE! *Imagine* how he'll vote as a U.S. Senator.

3
4 Paid for by If He Votes Like That In Salem Imagine What He Will Do In
5 Congress (www.ifhevoteslikethatinsalem.com) and not authorized by any
6 candidate or candidate's committee.

7 Compl., Ex. A (emphases in original).

8 The second advertisement was a radio advertisement. The radio advertisement, as
9 represented in an audio clip and transcript attached to the Complaint, ran 57 seconds, and stated:

10 Republican Jason Conger voted with Democrats for Oregon's Obamacare. Not
11 once or twice, or three or four times – Republican Jason Conger voted five times
12 with Democrats for Oregon's Obamacare. Republican Jason Conger also voted
13 with Democrats for the boondoggle I-5 light rail bridge. You know, the one that
14 promised astronomical costs coupled with high tolls for working people, but no
15 traffic relief. And Republican Jason Conger voted with Democrats to put the
16 government into the hotel business, competing with private enterprise. Jason,
17 Republicans don't like it when you vote that way. So now we're gonna vote 'no'
18 on Jason Conger!

19
20 Paid for by If He Votes Like That In Salem Imagine How He Will Vote In
21 Congress. Not authorized by any candidate or candidate's committee.

22 *Id.* at 2 n.2 (citing Jeff Mapes, *Timber Baron Andrew Miller Says He Didn't Tell Monica Wehby*
23 *About His Ads Attacking Jason Conger*, THE OREGONIAN, Apr. 16, 2014,
24 http://www.oregonlive.com/mapes/index.ssf/2014/04/timber_baron_andrew_miller_say.html
25 ("Mapes, *Timber Baron*") (providing an audio clip of the radio advertisement)), Ex. B.

26 Throughout the course of the primary campaign, several news articles discussing the
27 activities of If He Votes mentioned that Miller had formerly been "romantically linked to"
28 Wehby and involved in her campaign fundraising. *Id.* at 2-4.⁴ Miller publicly denied

⁴ The Complaint specifically cites to Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to*
Candidates for Governor, Senate and Congress, THE OREGONIAN, Oct. 30, 2013, http://www.oregonlive.com/politics/index.ssf/2013/10/top_oregon_gop_donor_andrew_mi.html, and Jeff Mapes,
Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger, THE
OREGONIAN, Apr. 15, 2014, http://www.oregonlive.com/mapes/index.ssf/2014/04/andrew_miller_friend_of_monica.html. According to a news report that was submitted to the Commission in this

1 coordinating with the Wehby campaign and was quoted as stating that “the advertising campaign
2 [by If He Votes] was run independently of Wehby and her campaign as required by federal
3 election law.” *Id.* at 2 n.2 (citing Mapes, *Timber Baron*). According to a news article in *The*
4 *Oregonian*:

5 Miller acknowledged that there is a “sidebar risk” that his advertising effort could
6 be seen negatively because of his relationship to Wehby. But, he added, “I don’t
7 think it’s relevant outside of a group of people who pay a lot of attention to
8 politics.” [Miller] said polling showed this risk was far outweighed by the
9 effectiveness of the attacks he and Parks are making on Conger’s voting record in
10 the state House.

11 *Id.*

12 The Commission possesses information that Gregg Clapper, a political consultant,
13 developed the two communications. The Commission also possesses information that Miller had
14 no involvement in the creation of content, media purchases, or timing of content dissemination to
15 the public attributable to If He Votes.

16 III. LEGAL ANALYSIS

17 The Complaint alleges that If He Votes made a prohibited contribution to Wehby by
18 coordinating the billboard and radio advertisement with the Wehby campaign. Compl. at 3-4;
19 Supp. Compl. at 3-4. Under the Act, when a person or committee pays for a communication that
20 is coordinated with a candidate or his or her authorized committee, the communication is
21 considered an in-kind contribution from the person or committee to that candidate and is subject
22 to the limits, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30116(a)(7)(B)(i);
23 11 C.F.R. § 109.21(b). Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is

matter, Miller and Wehby ended their dating relationship in the spring of 2013. See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>).

1 paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more
2 of four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of six
3 conduct standards set forth at 11 C.F.R. § 109.21(d).

4 In this matter, the payment and content prongs are satisfied. If He Votes reported making
5 a \$5,950 disbursement for billboard expenses on March 19, 2014, and \$59,557 in total
6 independent expenditures for "radio ads" between April 1, 2014, and April 3, 2014. *See*
7 11 C.F.R. § 109.21(a)(1). Moreover, based on information before the Commission, it appears
8 that the billboard and radio advertisement meet the content prong because each is a public
9 communication that clearly identified Conger, was disseminated within 90 days of the May 20,
10 2014, primary election, and was targeted to voters in Oregon. *See* 11 C.F.R. § 109.21(c)(4).

11 The main issue, therefore, is whether the communications satisfied the conduct prong.
12 The conduct standard is satisfied when, among other things, the communication is made at the
13 request or suggestion of a candidate, a candidate or authorized committee is materially involved
14 in decisions regarding the communication, or a communication is made after substantial
15 discussion about that communication with a candidate.⁵ *See* 11 C.F.R. §§ 109.21(d)(1)-(3).
16 Neither the material involvement nor substantial discussion standard is "satisfied if the
17 information material to the creation, production, or distribution of the communication was
18 obtained from a publicly available source." 11 C.F.R. §§ 109.21(d)(2)-(3).

19 The Complaint asserts that Miller was "intimately involved" with Wehby both personally
20 and as a fundraiser, and therefore likely "exposed to nonpublic information about the campaign's

⁵ The other three types of conduct that may satisfy the conduct standard are using a common vendor, using a former employee, and republication of campaign materials. *See* 11 C.F.R. § 109.21(d)(4)-(6). Because the Complaint does not allege this conduct, and because the Commission possesses information indicating that Clapper did not do any work for Wehby or her campaign, the Commission's analysis does not address these three types of conduct.

1 nonpublic plans, projects, activities, or needs.” Compl. at 4. The Complaint cites news articles
2 to support the theory that Miller’s relationship with Wehby allowed him access to inside
3 campaign information.⁶ Another article provided to the Commission, however, states that the
4 relationship ended the previous year, in the spring of 2013.⁷

5 The Complaint also asserts that “Miller was intimately involved in the strategic decision-
6 making of If He Votes” because he had spoken on the public record about If He Votes’ polling
7 decisions as a representative of the group. *Id.* at 3; Supp. Compl. at 2. Yet the Commission
8 possesses information that Miller had no involvement in any such polling effort. Moreover, the
9 Commission possesses information that If He Votes did not conduct any polling.

10 The Complaint further asserts that by contributing funds and the use of billboard
11 advertising space, Miller was involved “in decisions regarding the time, place, and manner” of
12 the advertisement, Compl. at 3, but the Commission possesses information that Miller had no
13 input into the two communications. In this case, Miller’s contribution of funds and the use of
14 “some billboard time” to If He Votes does not alone establish the conduct prong of 11 C.F.R.
15 § 109.21. The record provides no indication that Miller actually had access to non-public
16 campaign information, and it does not establish that he requested or made decisions on behalf of
17 Wehby as to how the funds or billboard time were to be used. *See* 11 C.F.R. § 109.21(d).

18 Under the circumstances, the Commission concludes that pursuing this matter

⁶ See Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to Candidates for Governor, Senate and Congress*, THE OREGONIAN, Oct. 30, 2013, http://www.oregonlive.com/politics/index.ssf/2013/10/top_oregon_gop_donor_andrew_mi.html, and Jeff Mapes, *Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger*, THE OREGONIAN, Apr. 15, 2014, http://www.oregonlive.com/inapcs/index.ssf/2014/04/andrew_miller_friend_of_monica.html.

⁷ See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>.

- 1 further would not be a prudent use of its resources. Accordingly, the Commission exercises its
- 2 prosecutorial discretion to dismiss the allegations that Dr. Monica Wehby for U.S. Senate and
- 3 Bryan Burch in his Official Capacity as Treasurer or Dr. Monica Wehby accepted in-kind
- 4 contributions as a result of the advertisements in violation of 52 U.S.C. § 30116(f).

UNCLASSIFIED

1 FEDERAL ELECTION COMMISSION

2
3 FACTUAL AND LEGAL ANALYSIS

4
5 MUR: 6817

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7 RESPONDENT: Andrew Miller

8
9 I. INTRODUCTION

10 This matter was generated by a complaint alleging violations of the Federal Election
11 Campaign Act of 1971, as amended (the "Act"), by Dr. Monica Wehby for U.S. Senate and
12 Bryan Burch in his Official Capacity as Treasurer ("Wehby Committee"), Dr. Monica Wehby, If
13 He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her
14 Official Capacity as Treasurer ("If He Votes"), and Andrew Miller. The Complaint alleges that
15 If He Votes made a prohibited contribution to Wehby by coordinating a billboard and radio
16 advertisement with the Wehby campaign.

17 As explained below, the Commission exercises its prosecutorial discretion to dismiss the
18 allegations that Andrew Miller made in-kind contributions as a result of the advertisements in
19 violation of 52 U.S.C. § 30116(a). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

20 II. FACTS

21 A. Background

22 Dr. Monica Wehby was a candidate in the 2014 Republican Senate primary in Oregon.¹
23 She filed her Statement of Candidacy with the Commission on October 24, 2013. The Wehby
24 Committee is Wehby's authorized campaign committee. Representative Jason Conger was
25 Wehby's opponent in the primary race.

¹ Wehby won the Republican primary on May 20, 2014, making her the Republican nominee for the general election. Wehby lost the general election on November 4, 2014.

1 If He Votes is an independent expenditure-only political committee registered with the
2 Commission. It filed its Statement of Organization on March 5, 2014, and has regularly filed
3 disclosure reports and independent expenditure notices with the Commission.

4 To date, If He Votes has been funded primarily by two individuals, Loren Parks and
5 Andrew Miller. Of the \$114,033 that If He Votes has received in total receipts since its
6 formation, Parks and Miller have contributed \$83,033 and \$30,950, respectively. Of the
7 \$30,950 that Miller contributed to If He Votes, \$5,950 consisted of in-kind "billboard" expenses.
8 See If He Votes 2014 April Quarterly Report (filed Apr. 14, 2014).

9 Miller also contributed \$5,200 to the Wehby Committee on November 1, 2013, and was
10 one of 25 hosts listed on an invitation for a Wehby Committee fundraiser at a private residence
11 on April 30, 2014. See Wehby Committee 2013 Year-End Report (filed Jan. 26, 2014); Compl.,
12 Ex. C.

13 **B. If He Votes' Communications**

14 Since its formation, If He Votes has sponsored at least two communications criticizing
15 Conger.² The first advertisement was a billboard, for which Miller appears to have made the
16 in-kind contribution to If He Votes in the amount of \$5,950.³ The billboard, as represented in a
17 photograph attached to the Complaint, read:

² If He Votes' disclosure reports indicate that it also made an independent expenditure of \$6,860 for a "mailer" opposing Conger on May 15, 2014. See If He Votes July 2014 Quarterly Report (filed July 15, 2014). This mailer is not raised in the Complaint, and we do not address it in this Report.

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2 OBAMACARE! *Imagine* how he'll vote as a U.S. Senator.

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5 Congress (www.ifhevoteslikethatinsalem.com) and not authorized by any
6 candidate or candidate's committee.

7 Compl., Ex. A (emphases in original).

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9 represented in an audio clip and transcript attached to the Complaint, ran 57 seconds, and stated:

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11 once or twice, or three or four times – Republican Jason Conger voted five times
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14 promised astronomical costs coupled with high tolls for working people, but no
15 traffic relief. And Republican Jason Conger voted with Democrats to put the
16 government into the hotel business, competing with private enterprise. Jason,
17 Republicans don't like it when you vote that way. So now we're gonna vote 'no'
18 on Jason Conger!

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20 Paid for by If He Votes Like That In Salem Imagine How He Will Vote In
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22 *Id.* at 2 n.2 (citing Jeff Mapes, *Timber Baron Andrew Miller Says He Didn't Tell Monica Wehby*
23 *About His Ads Attacking Jason Conger*, THE OREGONIAN, Apr. 16, 2014,
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26 Throughout the course of the primary campaign, several news articles discussing the
27 activities of If He Votes mentioned that Miller had formerly been "romantically linked to"
28 Wehby and involved in her campaign fundraising. *Id.* at 2-4.⁴ Miller publicly denied

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1 coordinating with the Wehby campaign and was quoted as stating that "the advertising campaign
2 [by If He Votes] was run independently of Wehby and her campaign as required by federal
3 election law." *Id.* at 2 n.2 (citing Mapes, *Timber Baron*). According to a news article in *The*
4 *Oregonian*:

5 Miller acknowledged that there is a "sidebar risk" that his advertising effort could
6 be seen negatively because of his relationship to Wehby. But, he added, "I don't
7 think it's relevant outside of a group of people who pay a lot of attention to
8 politics." [Miller] said polling showed this risk was far outweighed by the
9 effectiveness of the attacks he and Parks are making on Conger's voting record in
10 the state House.

11 *Id.*

12 Miller states that Gregg Clapper, a political consultant, ran the "PAC campaign." Miller
13 Resp. at 1. Miller asserts that he "had no involvement in the creation of content, media
14 purchases, or timing of content dissemination to the public attributable to [If He Votes]." *Id.*
15 The Commission possesses information that corroborates Miller's contentions.

16 III. LEGAL ANALYSIS

17 The Complaint alleges that If He Votes made a prohibited contribution to Wehby by
18 coordinating the billboard and radio advertisement with the Wehby campaign. Compl. at 3-4;
19 Supp. Compl. at 3-4. Under the Act, when a person or committee pays for a communication that
20 is coordinated with a candidate or his or her authorized committee, the communication is
21 considered an in-kind contribution from the person or committee to that candidate and is subject
22 to the limits, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30116(a)(7)(B)(i);
23 11 C.F.R. § 109.21(b). Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is

andrew miller friend of monica.html. According to a news report that was submitted to the Commission in this matter, Miller and Wehby ended their dating relationship in the spring of 2013. See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>).

1 paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more
2 of four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of six
3 conduct standards set forth at 11 C.F.R. § 109.21(d).

4 In this matter, the payment and content prongs are satisfied. If He Votes reported making
5 a \$5,950 disbursement for billboard expenses on March 19, 2014, and \$59,557 in total
6 independent expenditures for "radio ads" between April 1, 2014, and April 3, 2014. *See*
7 11 C.F.R. § 109.21(a)(1). Moreover, based on information before the Commission, it appears
8 that the billboard and radio advertisement meet the content prong because each is a public
9 communication that clearly identified Conger, was disseminated within 90 days of the May 20,
10 2014 primary election, and was targeted to voters in Oregon. *See* 11 C.F.R. § 109.21(c)(4).

11 The main issue, therefore, is whether the communications satisfied the conduct prong.
12 The conduct standard is satisfied when, among other things, the communication is made at the
13 request or suggestion of a candidate, a candidate or authorized committee is materially involved
14 in decisions regarding the communication, or a communication is made after substantial
15 discussion about that communication with a candidate.⁵ *See* 11 C.F.R. §§ 109.21(d)(1)-(3).
16 Neither the material involvement nor substantial discussion standard is "satisfied if the
17 information material to the creation, production, or distribution of the communication was
18 obtained from a publicly available source." 11 C.F.R. §§ 109.21(d)(2), (3).

19 The Complaint asserts that Miller was "intimately involved" with Wehby both personally
20 and as a fundraiser, and therefore likely "exposed to nonpublic information about the campaign's

⁵ The other three types of conduct that may satisfy the conduct standard are using a common vendor, using a former employee, and republication of campaign materials. *See* 11 C.F.R. § 109.21(d)(4)-(6). Because the Complaint does not allege this conduct, and because the Commission possesses information indicating that Clapper did not do any work for Wehby or her campaign, the Commission's analysis does not address these three types of conduct.

1 nonpublic plans, projects, activities, or needs." Compl. at 4. The Complaint cites news articles
2 to support the theory that Miller's relationship with Wehby allowed him access to inside
3 campaign information.⁶ Another article provided to the Commission, however, states that the
4 relationship ended the previous year, in the spring of 2013.⁷

5 The Complaint also asserts that "Miller was intimately involved in the strategic decision-
6 making of If He Votes" because he had spoken on the public record about If He Votes' polling
7 decisions as a representative of the group. *Id.* at 3; Supp. Compl. at 2. Yet the Commission
8 possesses information that Miller had no involvement in any such polling effort. Moreover, the
9 Commission possesses information that If He Votes did not conduct any polling.

10 The Complaint further asserts that by contributing funds and the use of billboard
11 advertising space, Miller was involved "in decisions regarding the time, place, and manner" of
12 the advertisement, Compl. at 3, but Miller asserts that he "had no involvement in the creation of
13 content, media purchases, or timing of content dissemination to the public attributable to [If He
14 Votes]." Miller Resp. at 1. In this case, Miller's contribution of funds and the use of "some
15 billboard time" to If He Votes does not alone establish the conduct prong of 11 C.F.R. § 109.21.
16 The record provides no indication that Miller actually had access to non-public campaign
17 information, and it does not establish that he requested or made decisions on behalf of Wehby as
18 to how the funds or billboard time were to be used. *See* 11 C.F.R. § 109.21(d).

⁶ See Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to Candidates for Governor, Senate and Congress*, THE OREGONIAN, Oct. 30, 2013, http://www.oregonlive.com/politics/index.ssf/2013/10/top_oregon_gop_donor_andrew_miller.html, and Jeff Mapes, *Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger*, THE OREGONIAN, Apr. 15, 2014, http://www.oregonlive.com/mapes/index.ssf/2014/04/andrew_miller_friend_of_monica.html.

⁷ See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>.

1 Under the circumstances, the Commission concludes that pursuing this matter
2 further would not be a prudent use of its resources. Accordingly, the Commission exercises its
3 prosecutorial discretion to dismiss the allegations that Andrew Miller made in-kind contributions
4 as a result of the advertisements in violation of 52 U.S.C. § 30116(a). *See Heckler*, 470 U.S.
5 821.

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